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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Estate of DIONISIA M. PASAMONTE,
Deceased.

B160833

(Los Angeles County
Super. Ct. No. BP061469)

MARIANO M. PASAMONTE,

Petitioner and Respondent,

v.

ESTELA MARIE M. GASPERI et al.,

Objectors and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County, John B. McIlroy, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Bergkvist, Bergkvist & Carter and Carl M. Bergkvist for Objectors and Appellants.

Healey & Healey and Dennis J. Healey for Petitioner and Respondent.

I. INTRODUCTION

This is an appeal from a probate court order directing the return of certain personal property to the estate executor. We find substantial evidence supported the probate court's order. Accordingly, we affirm the order.

II. BACKGROUND

Mariano M. Pasamonte, Jr., as executor of the estate of his deceased mother, Dionisia M. Pasamonte, filed a petition for an order directing the transfer of property to the estate. (Former Prob. Code,¹ § 9860, subd. (a)(4), see now § 850.) The petition alleged Mr. Pasamonte's sisters, Gladys Grace M. Molina and Estela Marie M. Gasperi, were in possession of certain of the decedent's jewelry, which was property of the estate. Ms. Molina and Ms. Gasperi claimed Mr. Pasamonte had given them the jewelry in his capacity as executor and residual beneficiary of the estate, consistent with their mother's wishes.

Mr. Pasamonte testified that prior to initiating probate proceedings, he gave his mother's jewelry to his sister, Ms. Gasperi, and her husband, Stephen Gasperi, for safekeeping. Mr. Pasamonte told the Gasperi couple, "[T]his is only for safekeeping." Mr. Pasamonte did not want to leave the jewelry in his mother's house, which was going to be vacant, even though it had been kept in a 500-pound gun safe. Mr. Pasamonte left other things in the safe, but they were not of much value. Mr. Pasamonte did not make a gift of the jewelry to his sisters. Mr. Pasamonte subsequently requested return of the jewelry. Mr. Pasamonte's attorney said the jewelry had to be inventoried. In addition, it was necessary for the administration of the estate. Mr. Pasamonte needed to liquidate the

¹ All further statutory references are to the Probate Code except where otherwise noted.

jewelry to pay for ongoing probate proceedings in Hawaii and the Philippines.

Ms. Molina and Ms. Gasperi refused to return the jewelry.

Ms. Gasperi testified Mr. Pasamonte gave the jewelry to her. Ms. Gasperi in turn gave some of the jewelry to Ms. Molina. Mr. Pasamonte told them “go ahead and take it.” According to Ms. Gasperi, the two sisters opened the safe and began dividing up the jewelry. But then Mr. Pasamonte told them, “[W]hy don’t you take the jewelry and divide it later.” Sometime later that afternoon, Mr. Pasamonte said he had spoken to his wife and she wanted a certain bracelet. Ms. Molina and Ms. Gasperi refused to turn over the bracelet. That evening, during a telephone conversation, Mr. Pasamonte told Ms. Gasperi he wanted the jewelry back. Ms. Molina testified that on the day the jewelry was removed from their mother’s house, Mr. Pasamonte told her, “[Y]es, it’s yours, take it.”

Mr. Gasperi spoke with Mr. Pasamonte on the day the jewelry was removed from the safe. Mr. Gasperi described the conversation with Mr. Pasamonte as follows, “[H]e had come up to me and he just basically just said he had handed over the jewelry to my wife and to her sister.” Mr. Pasamonte never said the jewelry was being given to Ms. Molina and Ms. Gasperi for safekeeping. Also on that day, Mr. Pasamonte spoke to his wife on the telephone. Mr. Gasperi could hear her voice. At first Ms. Pasamonte’s voice was “very low.” But when Mr. Pasamonte told his wife he had given the jewelry to his sisters, Ms. Pasamonte’s voice “grew immensely.”

The probate court found: the jewelry in the possession of Ms. Molina and Ms. Gasperi was rightfully owned by the estate; there was “insufficient credible evidence to show an intent to make a completed gift of [the] jewelry at a time when there was no estate representative to make what was, in effect, a preliminary distribution of [e]state assets”; and Mr. Pasamonte was entitled, as executor, to take title to and possession of the jewelry. Ms. Molina and Ms. Gasperi were ordered to immediately transfer the jewelry to Mr. Pasamonte.

III. DISCUSSION

Title to personal property, passes, upon the death of the owner, to the person to whom it is bequeathed. (§ 7000; *Noble v. Beach* (1942) 21 Cal.2d 91, 94; *Estate of Yorba* (1917) 176 Cal. 166, 169; *Estate of McGuigan* (2000) 83 Cal.App.4th 639, 653, fn. 11; *Fountain v. Bank of America* (1952) 109 Cal.App.2d 90, 94-95; *Estate of Giordano* (1948) 85 Cal.App.2d 588, 593-594; 25 Cal.Jur.3d (1995) Decedents' Estates, §§ 891, 1353.) Section 7000 provides, "Subject to Section 7001, title to a decedent's property passes on the decedent's death to the person to whom it is devised in the decedent's last will or, in the absence of such a devise, to the decedent's heirs as prescribed in the laws governing intestate succession."

However, an executor has the right to take possession of the decedent's property for purposes of estate administration. (§§ 7001, 9650, subd. (a)(1); *Matter of Estate of Woodworth* (1867) 31 Cal. 595, 604; *Mac v. Bank of America* (1999) 76 Cal.App.4th 562, 566; *Fountain v. Bank of America, supra*, 109 Cal.App.2d at pp. 94-95; *Cartwright v. Cartwright* (1950) 96 Cal.App.2d 932, 936; 25 Cal.Jur.3d, *supra*, Decedents' Estates, § 891.) Section 7001 states, "The decedent's property is subject to administration under this code, except as otherwise provided by law, and is subject to the rights of beneficiaries, creditors, and other persons as provided by law." Section 9650, subdivision (a)(1) provides, "The personal representative has the right to, and shall take possession or control of, all the property of the decedent to be administered in the decedent's estate" As the Court of Appeal held in *Fountain v. Bank of America, supra*, 109 Cal.App.2d at page 95, "'The personal representative is generally entitled to the exclusive possession of the personalty of the estate for the purposes, and during the course, of administration. His possession is deemed that of the court.' (33 C.J.S. 'Executors and Administrators,' § 300.)" The executor's right of present possession continues until the estate is settled by order of the probate court. (*Estate of Piercy* (1914) 168 Cal. 750, 753; *Matter of Estate of Woodworth, supra*, 31 Cal. at p. 604; *Fountain v.*

Bank of America, supra, 109 Cal.App.2d at pp. 94-95; 25 Cal.Jur.3d, *supra*, Decedents' Estates, §§ 865, 891.)

Moreover, a party in possession of estate property must turn it over to the executor upon request. (§ 9650, subd. (c); *Horton v. Jack* (1896) 115 Cal. 29, 34; *Cartwright v. Cartwright, supra*, 96 Cal.App.2d at p. 936; *Estate of Boggs* (1939) 33 Cal.App.2d 30, 32-33; 25 Cal.Jur.3d, *supra*, Decedents' Estates, §§ 865, 891; see *Olson v. Toy* (1996) 46 Cal.App.4th 818, 823.) Section 9650, subdivision (c) states: "Real property or tangible personal property may be left with or surrendered to the person presumptively entitled to it unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The person holding the property shall surrender it to the personal representative on request by the personal representative." As the Court of Appeal held in *Cartwright v. Cartwright, supra*, 96 Cal.App.2d at page 936, "Since the [decedent's] personal property . . . had been distributed without going through the formalities of having her estate probated, the parties receiving the same [were] accountable to the special administrator of [the] estate, and the trial court should have ordered the personal property or its value delivered to plaintiff as special administrator of the estate"

Pursuant to Civil Code section 1146, "A gift is a transfer of personal property, made voluntarily, and without consideration." As the Court of Appeal explained in *Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 358, "'Case law has defined the elements of a gift as follows: (1) competency of the donor to contract; (2) a voluntary intent on the part of the donor to make a gift; (3) delivery, either actual or symbolical; (4) acceptance, [either] actual or imputed; (5) complete divestment of all control by the donor; and (6) lack of consideration for the gift. [Citations.]' (*Jaffe v. Carroll* (1973) 35 Cal.App.3d 53, 59 [],) It is the *intent* with which the delivery is made which is the primary essential, for unless the donor *intends* to divest itself completely of control and dominion over the property, the gift is incomplete. (*Union Mutual Life Ins. Co. v. Broderick* (1925) 196 Cal. 497, 502-503 []; *Estate of Raphael*

(1953) 115 Cal.App.2d 525, 533 [.]” (Italics omitted in part; accord, *Estate of Franco* (1975) 50 Cal.App.3d 374, 381 [“There can be no gift unless there is intent on the part of the donor to give a present interest”]; 35 Cal.Jur.3d (1988) Gifts, § 15 [“A clear intention . . . to make a present transfer as a gift . . . is an essential element of a valid gift”].) Whether a gift is complete and effectual is a question of fact. (*Jaffe v. Carroll, supra*, 35 Cal.App.3d at p. 61; *Turnball v. Thomsen* (1959) 171 Cal.App.2d 779, 783.) The burden of proof that a gift was intended is on the purported donee. (*Blonde v. Estate of Jenkins* (1955) 131 Cal.App.2d 682, 685-686.)

We review the probate court’s order for substantial evidence. (*Estate of Joseph* (1998) 17 Cal.4th 203, 217; *Estate of MacDonald* (1990) 51 Cal.3d 262, 266; *Estate of Leslie* (1984) 37 Cal.3d 186, 201.) As the Supreme Court explained in *Estate of Leslie, supra*, 37 Cal.3d at page 201, “In reviewing the sufficiency of the evidence, this court is guided by well-settled principles. ‘[T]he power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the trial court’s findings. [Citations.] ‘We must therefore view the evidence in the light most favorable to the prevailing party, giving [him] the benefit of every reasonable inference and resolving all conflicts in [his] favor’ [Citation.]”

Ms. Molina and Ms. Gasperi correctly assert Mr. Pasamonte, as the residuary beneficiary of their mother’s estate, had title to the jewelry. (§ 7000; *Noble v. Beach, supra*, 21 Cal.2d at p. 94; *Estate of Yorba, supra*, 176 Cal. at p. 169; *Fountain v. Bank of America, supra*, 109 Cal.App.2d at pp. 94-95; *Estate of Giordano, supra*, 85 Cal.App.2d at pp. 593-594; 25 Cal.Jur.3d, *supra*, Decedents’ Estates, §§ 891, 1353; see *Estate of McGuigan, supra*, 83 Cal.App.4th at p. 653, fn. 11.) Ms. Molina and Ms. Gasperi contend Mr. Pasamonte made a gift of the jewelry to them. However, substantial evidence supported the probate court’s finding Mr. Pasamonte did not intend to make a completed gift of the jewelry. Mr. Pasamonte testified he did not intend to make a gift of the jewelry to Ms. Molina and Ms. Gasperi; he gave them the jewelry for safekeeping

only. The testimony of a single witness concerning the intent or lack of intent to make a gift, if credited by the trial court, constitutes substantial evidence. (E.g., *Ogden v. Title Ins. & Trust Co.* (1954) 129 Cal.App.2d 26, 27; *In re Carlin* (1912) 19 Cal.App. 168, 170-171; see also *Brunner v. Title Ins. & Trust Co.* (1914) 26 Cal.App. 35, 40.) Therefore, even though, as noted above, title to the jewelry passed to Mr. Pasamonte, as residuary beneficiary, upon his mother's death, there was substantial evidence he did not have the requisite intent to make a gift of the jewelry to Ms. Molina and Ms. Gasperi. (Civ. Code, § 1146; *Union Mutual Life Ins. Co. v. Broderick*, *supra*, 196 Cal. at pp. 502-503; *Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 73 Cal.App.4th at p. 358; *Estate of Franco*, *supra*, 50 Cal.App.3d at p. 381; *Jaffe v. Carroll*, *supra*, 35 Cal.App.3d at p. 59; *Estate of Raphael*, *supra*, 115 Cal.App.2d at p. 533; 35 Cal.Jur.3d, *supra*, Gifts, § 15.)

Moreover, Mr. Pasamonte, as executor of his mother's estate, had a right to possession of the jewelry until the estate was settled. (§§ 7001, 9650, subd. (a)(1); *Estate of Piercy*, *supra*, 168 Cal. at p. 753; *Matter of Estate of Woodworth*, *supra*, 31 Cal. at p. 604; *Mac v. Bank of America*, *supra*, 76 Cal.App.4th at p. 566; *Fountain v. Bank of America*, *supra*, 109 Cal.App.2d at pp. 94-95; *Cartwright v. Cartwright*, *supra*, 96 Cal.App.2d at p. 936; 25 Cal.Jur.3d, *supra*, Decedents' Estates, §§ 865, 891.) Because the property was distributed prior to probate of the decedent's estate, Ms. Molina and Ms. Gasperi could be required to surrender the jewelry to Mr. Pasamonte's possession, as executor, if, as he testified, in his judgment possession of the gems was necessary for the administration of the estate. (§ 9650, subd. (c); *Horton v. Jack*, *supra*, 115 Cal. at p. 34; *Cartwright v. Cartwright*, *supra*, 96 Cal.App.2d at p. 936; *Estate of Boggs*, *supra*, 33 Cal.App.2d at pp. 32-33; 25 Cal.Jur.3d, *supra*, Decedents' Estates, §§ 865, 891; see *Olson v. Toy*, *supra*, 46 Cal.App.4th at p. 823.) Accordingly, the probate court's order must be affirmed.

IV. DISPOSITION

The order is affirmed. Mariano M. Pasamonte, Jr., as executor of the estate of Dionisia M. Pasamonte, is to recover his costs on appeal jointly and severally from Gladys Grace M. Molina and Estela Marie M. Gasperi.

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TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.